76-341

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76 76-341

THE STATE OF CALIFORNIA, acting by and through the DEPARTMENT OF WATER RESOURCES,

Petitioner,

vs.

THE OROVILLE-WYANDOTTE IRRIGATION DISTRICT, an irrigation district,

Respondent.

Brief of Respondent the Oroville-Wyandotte Irrigation District in Opposition to Petition for Writ of Certiorari

J. THOMAS ROSCH
JOHN R. REESE
McCUTCHEN, DOYLE, BROWN & ENERSEN
601 California Street
San Francisco, California 94108
Telephone: (415) 981-3400
Attorney for Respondent The Oroville-Wyandotte Irrigation District

P. J. MINASIAN
MINASIAN, MINASIAN, MINASIAN, SPRUANCE & BADER
1681 Bird Street
Oroville, California 95965
Of Counsel

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Respondent, The Oroville-Wyandotte Irrigation District ("OWID"), opposes the petition for writ of certiorari on the ground that petitioner Department of Water Resources ("DWR") has failed to demonstrate that "there are special and important reasons therefor" as required by Rule 19 of the Rules of this Court and on the further ground that the issues raised by petitioner, having been heard and decided by the California Supreme Court in a decision which was not appealed to this Court, are barred by res judicata.

QUESTIONS PRESENTED

(1) Is there any "special and important reason" for granting a writ of certiorari where:

(a) petitioner admits that the controlling issue on the merits of the controversy is simply an issue of interpretation of two orders—i.e., one from the California Public Utilities Commission ("CPUC") and the other from the Federal Power Commission ("FPC") — to determine whether the two orders conflict;

(b) the California Supreme Court, the District Court below, and the Ninth Circuit Court of Appeals have all found no conflict; and

(c) there are no decisions either of the Courts of Appeals or of this Court to the contrary?

(2) Is a writ of certiorari appropriate where the issues raised by the petitioner have heretofore been adjudicated against petitioner by the California Supreme Court in a decision which petitioner failed to appeal to this Court?

COUNTER STATEMENT OF THE CASE

The controversy which petitioner seeks to bring to this Court is between two agencies of the State of California, petitioner DWR and respondent OWID. (See Cal. Water Code Secs. 20570, 11102.)

OWID operates a system of dams, reservoirs, conduits and power houses that supplies domestic and irrigation water to several thousand residents of Butte County. These facilities are located in the South Fork of the Feather River and its headwaters. They include the Miners Ranch Canal and an associated maintenance road which run along the South Fork above the present location of Oroville Reservoir. This reservoir is a part of the State Water Project operated by DWR. The controversy between the parties

arises out of the fact that the operation of Oroville Reservoir, particularly wave action and draw down of the reservoir, impairs the stability of OWID's canal and road and threatens them with damage and destruction. OWID has contended that DWR is responsible for the effects of its reservoir and DWR has denied responsibility.

This history of the two projects is documented at length in the record before the FPC. In substance, that record shows that the planning and licensing of OWID's South Fork project occurred at a time (1952-1960) when it was contemplated that a much larger project would be built downstream which was likely to destroy or at least adversely affect OWID's project. It was not known, however, who would build that project (California or the federal government), where it would be located (Bidwell Bar or Oroville), or indeed when and whether it would in fact be built. Meanwhile, all concerned acknowledged the need for OWID's project to proceed in order to utilize the badly-needed upstream water and power resources. It was recognized that if, as and when the much larger Oroville project was undertaken, it would have priority, but it would also have the obligation to relocate or restore facilities of OWID which would be adversely affected.

The record shows that the FPC was well aware of this situation. For example, when in 1956 it first issued the license to DWR for the Oroville project (No. 2100) after having previously issued a license to OWID for the South Fork project (No. 2088), it included the following statement:

> "Oroville-Wyandotte Irrigation District, Licensee for major Project No. 2088, protested the issuance of a license for the project, stating that its Palermo Canal and diversion works are located in the proposed Oroville Reservoir site and would be flooded by the proj-

ect; that the last nine miles of its 'Miners Ranch' diversion ditch, to be constructed, will be flooded at high-water stage of the proposed Oroville Reservoir as revised and now planned; and that, although it believes that satisfactory arrangements and construction can be agreed upon, until the details for preventing conflict in the operation of both projects are worked out, it feels it necessary to protest against the project. It is assumed that the Applicant will reach an agreement with the Irrigation District in this matter, but in any event the provisions of Section 10(c) of the Act make each licensee liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project or of the works appurtenant or accessory thereto, constructed under a license." (16 F.P.C. at 1340-41)

Thus from the outset, the FPC recognized that DWR might well become responsible to OWID for any adverse impact of the Oroville project on OWID's South Fork project.

The South Fork project was constructed between October 1960 and January 1963. The FPC staff regularly inspected and approved the project while under construction. Pursuant to the provisions of the California Water Code, DWR also made regular and frequent inspections of the project, certifying that the construction was progressing in a satisfactory manner. At all times, however, DWR as well as the FPC were well aware that the South Fork project was likely to require modifications as a result of the later construction of Oroville Reservoir. Thus, in 1965, DWR wrote OWID, stating in part:

> "Our engineers will soon initiate definitive plans for the protection of your facilities, which include the downstream face of Ponderosa Dam, the Miners' Ranch conveyance system, and the communications

> lines. This requires the investigation and evaluation of several possible schemes, and the search for sources of materials.
>
> "The plan for relocating the communications lines is tied in with the relocation of the Oroville-Feather Falls County Road, which is expected to be firmed up in June 1965. At that time, we shall be in a position to propose a relocation of these lines, and present our proposals for the other work.
>
> "Oroville Reservoir will start to fill in the Spring of 1967. It is our plan to commence construction required for protection of your facilities approximately June 1, 1966." (C.R. 791, 795-798)

In 1966, however, DWR changed its position and repudiated its responsibility. The litigation followed.

In October 1966, OWID filed a petition with the CPUC for an order under California Water Code Sections 11590-11592 which requires DWR to provide substitute facilities for the facilities of a state agency taken or destroyed by DWR's water project. DWR vigorously opposed the granting of relief to OWID. After lengthy hearings and related proceedings, the CPUC issued an order in March 1974 holding DWR financially responsible for (1) replacing the lower 4400 feet of Miners Ranch Canal with a tunnel, (2) providing an improved all-weather maintenance road along the remaining canal, and (3) providing slope protection below the remaining canal. (C.R. 81-89) DWR petitioned for review by the California Supreme Court, but the petition (as well as the petition for rehearing) was denied (C.R. 618, 619) and no review was sought in this Court. The CPUC order accordingly is final and binding on DWR.

In the course of the CPUC proceedings, DWR made various efforts to abort the effect of that proceeding by instituting other litigation. In 1966, it filed an action in the

United States District Court in Sacramento, based on many of the same allegations made in the instant action, to enjoin the CPUC proceedings. The District Court denied relief and the Court of Appeals for the Ninth Circuit affirmed. *State of California v. Oroville-Wyandotte Irrigation District,* 409 F.2d 532 (9th Cir. 1969).

In March 1967, DWR instituted proceedings before the FPC by filing a protest opposing approval of the so-called "as built" drawings which OWID had filed following completion of its South Fork project in accordance with the requirements of its FPC license. In that protest, DWR in effect asked that the FPC impose on OWID the responsibility for dealing with the effects of Oroville Reservoir on the South Fork project.

Following a hearing, the FPC examiner issued an initial decision, largely adopting the views urged by DWR, including that responsibility rested on OWID and the CPUC had no jurisdiction to grant relief. OWID filed exceptions to this initial decision and the FPC did not adopt it.* Instead, on January 29, 1969, it issued its own order, specifically stating that it was not "expressing any opinion on the merits of the controversy." (C.R. 208-221) It ordered the parties to submit plans to deal with the problem of Miners Ranch Canal and directed the appointment of an

*DWR relies on this initial decision of the examiner for its assertion that "OWID failed during the construction of Miners Ranch Canal to fulfill its responsibility to design and construct the canal in a manner to operate compatibly with DWR's previously licensed Project 2100 . . . ." (Pet. 11) Since the FPC itself, on exceptions, declined to accept the initial decision and instead issued its own decision, the former is without legal standing or effect, and appellant's arguments, to the extent they are based upon it, are without foundation. See FPC Rules of Practice and Procedure, 18 C.F.R. 1.30(d).

independent Board of Consultants to review the plans and make recommendations.

After further proceedings culminating in recommendations by the Board of Consultants for construction of a tunnel and certain other protective work, the FPC adopted those recommendations (as did the CPUC in its final decision) and, on January 17, 1974, it issued its order approving OWID's drawings implementing those recommendations and providing that OWID should commence construction not later than September 1, 1974. (C.R. 222-229) The decision is entirely silent on the issue of who is to pay for the work and the CPUC's jurisdiction to decide it. It leaves no doubt, however, that the FPC considered the need for the work to result from DWR's construction and operation of Oroville Reservoir (not from any improper action of OWID):

> "The structural integrity of the existing Miners Ranch Canal built in the period 1960-63 *has been affected by the development and operation of Lake Oroville Project No. 2100*, located in close proximity to Miners Ranch Canal which has an elevation of about 909 feet to 911 feet in the lower reach. This critical section would be by-passed by the proposed tunnel. Lake Oroville reached its maximum water surface elevation of 900 feet in 1969. Since that time *wave action has eroded the cut and fill slopes of the canal and lake surface fluctuations have induced numerous small slides and this action has generally degraded foundation stability along the canal. Thus the need for the tunnel has become increasingly urgent.*" (C.R. 224; all emphasis herein is added.)

The time to seek review of that order has expired and it is now final.

The complaint in the instant action was filed on October 30, 1974, shortly after the California Supreme Court had

denied review of the CPUC order. In it DWR sought to be relieved of its obligations under the CPUC order by asserting that CPUC lacked jurisdiction and its order conflicted with the FPC order. OWID filed a counterclaim for an order under Section 10(c) of the Federal Power Act (16 U.S.C. Sec. 803(c)) directing and requiring DWR to comply with the order of the CPUC. CPUC was granted leave to intervene as a defendant. On cross-motions for summary judgment, the District Court denied DWR's motion and granted those of OWID and CPUC. 411 F. Supp. 361 (E.D. Ca. 1975). The Court of Appeals for the Ninth Circuit affirmed. 536 F.2d 304 (9th Cir. 1976).

ARGUMENT

I. There Is No "Special and Important Reason" for This Court to Review the Decision of the Court of Appeals Which Merely Interpreted the Orders of the CPUC and the FPC and Found No Conflict Between Them.

Rule 19 of this Court's rules provides in pertinent part that:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Rule 19 then goes on to define factors which "while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered" in making that determination. DWR claims that just one of those factors is present here—i.e., that the "court of appeals 'has decided a federal question in a way in conflict with applicable decisions' of this court." (Pet. 20) It is apparent from the Ninth Circuit's decision and from DWR's own statement of the issues in its petition that that factor is not present.

More specifically, the Ninth Circuit, like the District Court, simply interpreted the order of the CPUC and the FPC and found that they did not conflict. It stated:

> "In a well-written and comprehensive memorandum decision issued on August 8, 1975, and reported in .... F.Supp. .... (E.D. Cal. 1975), Judge Thomas J. MacBride held that CPUC decision and the FPC order were entirely compatible. We agree for the reasons set forth in Judge MacBride's decision."

DWR's statement of the questions presented in its petition likewise makes it plain that if the two orders are not read to conflict with one another, that disposes of its case on the merits. Thus, the primary issue in the case, according to that statement is:

> "Does Decision 82561 of the California Public Utilities Commission issued March 12, 1974, re Application No. 48869 conflict with the Order of the Federal Power Commission issued January 17, 1974, re Projects 2088 and 2100?" (Pet. 2)

The second issue raised by DWR—a federal law pre-emption issue—arises, DWR admits, only "[i]f a conflict does exist between the decision and order referred to in Issue No. 1...." (Pet. 2)

There is no "special and important reason" for this Court to review the way that the Ninth Circuit interpreted the CPUC and FPC orders. DWR has cited no decisions of this Court—and we are aware of none—which conflict with its interpretation of these orders. Indeed, DWR has cited no case in which this Court has granted a petition for writ of certiorari to second-guess a Court of Appeals in its interpretation of such orders. The orders involved here are *sui generis* and applicable only to the parties. The legal impact of interpretation of the orders does not extend beyond the boundaries of this case. There is, accordingly, no reason

at all for this Court to spend its time and resources to review the determination which the Court of Appeals—as well as the California Supreme Court—has made.

II. The District Court and Court of Appeals Correctly Held That No Conflict Exists Between the Orders of the FPC and the CPUC.

A. THERE IS NO BASIS FOR THE CONTENTION THAT OWID VIOLATED ITS FPC LICENSE.

DWR contends that a conflict exists between the FPC order and the order of the CPUC and that the latter is therefore invalid. The argument appears to be based, not on the language of the two orders which clearly presents no conflict, but upon the premise that the need for substitute and modified facilities "were the result of OWID's intentional departure from the terms and conditions of its license . . ." (Pet. 19) This theme—that OWID violated its obligations under its license—recurs several times throughout DWR's petition. (See Pet. 11, 14, 17, 19). That this is DWR's premise is clear from its contention that:

> ". . . as a result of the Court of Appeals' decision, DWR is now responsible for conditions which would not have existed but for OWID's unauthorized modifications to Miners Ranch Canal." (Pet. 17)

It is also apparent from its assertion that:

> "the decision rewards a licensee for the intentional violation of the terms of its license and the Federal Power Act, and for this reason is also in conflict with the principle set forth by lower courts that no licensee should benefit by avoidance of its obligations under the Act and its license." (Pet. 20)

DWR's argument—as the FPC, the CPUC, the California Supreme Court, the District Court below, and the Ninth Circuit Court of Appeals have successively recognized—is a straw man, totally lacking in substance. The

plain fact is that, notwithstanding DWR's vigorous urging throughout this long controversy, no court or commission has ever found that OWID did not comply with the terms of its license, much less that the need for relocation and modification of project works is the result of acts or omissions of OWID.* The initial decision of the FPC examiner, who is the only one who ever accepted DWR's contentions, was not adopted by the FPC. Instead of adopting the views urged in the initial decision, the FPC found in its final decision that:

> "The structural integrity of the existing Miners Ranch Canal built in the period 1960-63 has been affected by the development and operation of Lake Oroville Project No. 2100, located in close proximity to Miners Ranch Canal which has an elevation of about 909 feet to 911 feet in the lower reach. This critical section would be by-passed by the proposed tunnel. Lake Oroville reached its maximum water surface elevation of 900 feet in 1969. Since that time wave action has eroded the cut and fill slopes of the canal and lake surface fluctuations have induced numerous small slides and this action has generally degraded foundation stability along the canal. Thus the need for the tunnel has become increasingly urgent." (C.R. 224)

Had the FPC shared DWR's view that the problems of the South Fork project were the result of OWID's unauthorized deviations from its license, it surely would have said so instead of making an unqualified finding that the integrity of Miners Ranch Canal "has been affected by the development and operation of Lake Oroville Project No. 2100."

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*The record before the FPC established that DWR's contention was made of whole cloth, and that, far from making unauthorized deviations, OWID's construction was approved at every step of the way not only by the FPC but by DWR itself.

Nor has DWR's contention in this respect been adopted by any of the other courts and agencies that have reviewed it. DWR has advanced it without success to the CPUC, the California Supreme Court, the District Court below and the Ninth Circuit Court of Appeals.

What DWR asks this Court to do, in other words, is to find on the basis of DWR's unsubstantiated charge of violation of OWID's license—a charge which two regulatory agencies and three courts have never accepted—that a conflict exists in the orders where none appears on their face. Such a finding would be baseless and unwarranted.

B. THE FPC DID NOT PURPORT TO DETERMINE FINANCIAL RESPONSIBILITY FOR THE MODIFICATIONS IT APPROVED IN ITS ORDER.

Article 51 of OWID's license (Pet. 13), on which DWR's claim is based, carefully refrains from dealing with the matter of financial responsibility. It directs OWID to commence and prosecute construction of the approved modifications as one would expect, for the modifications are of OWID's facilities. But it is silent as to who is to pay for the work.

The record shows that as long ago as 1956 the FPC, in issuing its first license to DWR for the Oroville project, recognized that DWR might be held liable for damage to OWID's project. (See pp. 3-4, above.) Article 51 is entirely consistent with the view that the FPC meant to leave the question of liability to be decided by other appropriate tribunals. That the FPC itself did not regard Article 51 as a determination of liability is reflected in its own decisions. Thus, in the order adding Article 51 to OWID's license in 1974, it described it merely as "set[ting] a time schedule for the completion of tunnel construction." (C.R. 225) And in January 1975, it issued an order modifying Article 51 so as to extend that time schedule on account of the pending litigation over liability.

Had the FPC considered Article 51 as imposing liability on OWID, preempting the CPUC's determination, it is unlikely that it would have dealt with that article in this manner. And that it did so can certainly not be attributed to inadvertence or ignorance of the issue of liability which, as the FPC well knew, was being vigorously litigated by the parties. It certainly would have made findings that OWID had failed to comply with its license had it meant to adopt the contention, on which DWR's entire position on the merits rests, to the effect that OWID should be held responsible for what allegedly are the consequences of its unauthorized deviations. Yet it did not do so.

For DWR to contend here that the FPC intended to decide the liability issue (thereby preempting CPUC) is strange indeed in view of the fact that after the initial decision had issued, DWR changed its position before the FPC on this issue. Previously the FPC's staff, in its reply brief to the examiner, had criticized DWR for urging that the FPC should adjudicate liability and contended that this issue "should be left to an appropriate court or administrative proceeding." (C.R. 775) When it filed its brief with the FPC, DWR apparently decided to join in that position, contending that liability was *not* an issue before the FPC. Counsel for DWR confirmed this fact in oral argument before the FPC when he declared: "We do not ask that this Commission decide as between OWID and the Department liability."* (C.R. 206-207)

To contend, in these circumstances, that the FPC order adjudicated liability in conflict with the CPUC order is

*Even in the district court, DWR at first conceded, perhaps inadvertently, that "The only issue with which the FPC did not deal was whether the State of California could impose on DWR an obligation to finance the modifications which the FPC directed OWID to undertake." (C.R. 319) That concession would seem to remove any possibility of conflict between the orders.

baseless. There is nothing contradictory about these orders —either in their language or their intent. They are in fact being carried out at this time without difficulty. DWR would have this Court go out of its way to find a conflict between federal and state jurisdictions where the agencies involved have themselves successfully accommodated their respective jurisdictions.

C. THE DETERMINATION OF LIABILITY FOR THE ADVERSE EFFECTS OF A PROJECT IS NOT WITHIN THE FPC'S JURISDICTION.

An additional reason why Article 51 must be read as not adjudicating liability to pay for the modifications is that both the Federal Power Act and the decisions under it have left liability for the consequences of a project to be determined by courts or other appropriate agencies.

Section 10(c) of the Act (16 U.S.C. Sec. 803(c)) provides, in relevant part:

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

The Courts and the FPC have uniformly held that the FPC has no power to adjudicate liability under Section 10(c) once a license is issued. While the FPC possesses the power to determine the allocation of responsibility *prior* to the issuance of a license (see, e.g., *Susquehanna Power Co.*, 32 F.P.C. 826, 56 P.U.R.3d 194, 199-200 (1964)), after a license is issued, liability for damage must be adjudicated in other forums. This view has been repeatedly stated by the FPC. See *Alabama Power Co.*, 33 F.P.C. 1105, 1107, 53 P.U.R.3d 407, 410 (1965); *Idaho Power Co.*, 29 F.P.C. 572,

48 P.U.R.3d 20, 21 (1963). The FPC could not have been more explicit when it held in *Idaho Power:*

> "Dispositive of the present complaint, however, is the consideration that, assuming the State of Oregon has sustained damage by reason of the Licensee's negligence and is entitled to a recovery therefor, *the Federal Power Commission is not the forum in which to litigate the issue of negligence and to determine the amount of the damage.*" 29 F.P.C. at 572.

Moreover, Section 21 of the Act (16 U.S.C. Sec. 814) establishes, and this Court's decision in *Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369 (1930), and numerous other decisions confirm, that a state tribunal is a proper forum for adjudicating liability under Section 10(c). See *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 59 S.E.2d 132 (S.C. 1950); *Great No. Ry. v. Washington Elec. Co.*, 86 P.2d 208 (Wash. 1939); *Alabama Power Co. v. Smith*, 155 So. 601 (Ala. 1934). DWR has cited no authority to the contrary, and we know of none.

D. THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS DO NOT CONFLICT WITH FIRST IOWA.

The only decision of this Court upon which DWR relies is *First Iowa Hydroelectric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), which DWR says "affirmed the exclusive regulatory powers of the FPC in the licensing of hydroelectric projects." (Pet. 19) Whether that is a correct reading of *First Iowa* is irrelevant since, as discussed above (p. 9), DWR itself acknowledges that the federal pre-emption issue arises if and only if the CPUC order and the FPC order are interpreted to conflict with one another, and there is no need or reason for the Court to review that matter. Obviously, there is no basis for finding that state law is pre-empted as an abstract propo-

sition. There being no conflict between Article 51 and the CPUC order by their terms, the question is moot.

The fact is, however, that DWR's application of *First Iowa* to the situation in this case is wrong. As another Ninth Circuit panel stated in an earlier decision in this controversy:

> "[DWR] urges that *First Iowa Hydroelectric Cooperative v. FPC*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143, applies. In that case, the FPC refused to issue a license until the applicant obtained approval from the state. The Court held that this gave the state a veto power over federal projects and destroyed the effectiveness of the Federal Power Act. In the present case, however, the California Public Utilities Commission does not have a veto power over the Department's Oroville Dam Project. It is merely charged with the duty of determining liability for damage done by one California agency to the property of another." (409 F.2d at 536)

The District Court in this case agreed stating:

> "This court concurs that the action of the CPUC, pursuant to California Water Code §§ 11590-11592, in establishing the financial liability of DWR for the taking and destruction of a portion of the OWID project, was a permissible action. The CPUC did not substantially alter nor did it prevent the operation of federal power projects. The CPUC action was not an interference with federal power projects, but rather, was in aid of these projects. As such, the action of the CPUC was entirely compatible with the duality inherent in the Federal Power Act." 411 F. Supp. at 368.

These views accord both with the terms of the Federal Power Act and with the decision of this Court. Because Sections 10(c) and 21 of the Act expressly reserve to the states the power to determine such matters as the liability of a licensee for damage to another's property (see pp. 14-15 above), it is clear that the Act does not preempt these areas of state law. This Court has expressly decided that Section 10(c) and the other saving provisions are intended to:

> "[S]o restrict the operation of the entire [Federal Power] [A]ct that the powers conferred by it and the [Federal Power] Commission do not extend to the impairment of the operation of those [state] laws . . . ." *Ford & Son, Inc., v. Little Falls Fibre Co.*, above 280 U.S. at 378. See also *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 255 (1954).

Nothing contained in *First Iowa* is to the contrary.

III. The Precise Issue Before This Court Has Heretofore Been Finally Adjudicated.

An additional reason for denying the petition arises from the fact that the same issues were raised by DWR before the CPUC and the California Supreme Court and were decided against it.

DWR raised all of the issues concerning federal preemption in seeking review of the CPUC proceedings and they were fully litigated there. In particular, DWR raised without any reservation the very same issues of alleged conflict between the CPUC and FPC orders in its petitions for review in the California Supreme Court. That court rendered its decision by denying the petition, and that, according to this Court, is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right . . . under the Constitution of the United States. . . ." *Napa Valley Elec. Co. v. Railroad Comm'n*, 251 U.S. 366, 372 (1920). Such an adjudication is res judicata as to all issues presented, 251 U.S. at 373; *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 268 P.2d 723 (1954).

Since this Court's decision in *Napa Valley Elec. Co.*, federal courts repeatedly have dismissed on the basis of res judicata claims arising from CPUC proceedings which previously had been presented to the California Supreme Court and adjudicated by the denial of a writ of review. See *Southern Pacific Co. v. Van Hoosear*, 72 F.2d 903, 905 (9th Cir. 1934); *Wallace Ranch Water Co. v. Railroad Comm'n*, 47 F.2d 8, 10 (9th Cir. 1931); *Consolidated Freightways, Inc. v. Railroad Comm'n*, 36 F. Supp. 629, 270-71 (N.D. Cal. 1941); *Oilwell Express Corp. v. Railroad Comm'n*, 11 F. Supp. 665, 668 (S.D. Cal. 1935); *Betts v. Railroad Comm'n*, 6 F. Supp. 591, 592 (S.D. Cal. 1933), *aff'd per curiam*, 291 U.S. 652 (1934); *Finn v. Railroad Comm'n*, 2 F. Supp. 891, 893 (N.D. Cal. 1933). In no case has a federal court allowed a party to relitigate such a claim after having once lost before the California Supreme Court.*

DWR purported to "reserve" its federal law claims at the outset of the CPUC proceedings but that is not a magic incantation giving it two bites at the apple. DWR in fact litigated those issues fully up to the California Supreme Court. Having done so, it has no right to start over again in this proceeding.

*DWR contended below that it could relitigate these issues again on the strength of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). Its reliance on *England*, however, is misplaced. *England* allows a party properly before a federal court—either as a plaintiff or as a defendant in a removed action—to return to federal court if the federal action is stayed to allow the parties to initiate an action in state court to obtain a decision regarding a controlling, but unsettled, question of state law. Once the state court action is completed, the federal court lifts its stay, and *England* merely precludes invoking res judicata at that point based on the state court action. See C. Wright, *Handbook of Law of Federal Courts*, 198-99 (2d ed. 1970). This is not a case where DWR was shunted from federal to state courts in order to allow state court resolution of unsettled state law issues. From the outset DWR was a respondent in the state administrative proceedings brought to enforce DWR's statutory obligations. DWR sought to escape those obligations by asking the federal courts to enjoin the administrative proceedings. The federal courts declined to do so, not on the ground of abstention to permit resolution of unsettled state law issues, but to avoid federal court interference in pending state proceedings. *State of California v. Oroville-Wyandotte Irrigation Dist.*, 409 F.2d 532, 536 (1969). In such a situation there is no right to return to federal court. See C. Wright, above at 200.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

J. Thomas Rosch
John R. Reese
McCutchen, Doyle, Brown & Enersen

By John R. Reese

Attorneys for Respondent The Oroville-Wyandotte Irrigation District

P. J. Minasian
Of Counsel

Dated: September 30, 1976.